

**No. 01-19-01008-CR**  
In the Court of Appeals  
for the  
First District of Texas

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CHRISTOPHER A. PRINE  
Clerk

—◆—  
No. 2012280  
In the County Criminal Court at Law No. 12  
of Harris County, Texas  
—◆—

**THE STATE OF TEXAS**

Appellant

v.

**LAKESIA KEYON BRENT,**

Appellee

—◆—  
STATE'S APPELLATE BRIEF  
—◆—

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ORAL ARGUMENT NOT REQUESTED

## **STATEMENT REGARDING ORAL ARGUMENT**

The State believes that the briefs in this case adequately address the matters raised. Therefore, the State does not request oral argument.

## **IDENTIFICATION OF THE PARTIES**

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), below is a complete list of the names of all interested parties.

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**Lindsay Bellinger** – Defense counsel at second discharge hearing

Trial Judge:

**Honorable Robin Brown** – Judge presiding at trial

**Honorable Genesis Draper** – Judge presiding at second discharge hearing

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## **TO THE HONORABLE COURT OF APPEALS:**

### **STATEMENT OF THE CASE & FACTS**

The facts necessary to the disposition of the State's claim of error are largely procedural. As such, the Statements of the Case and Facts will be consolidated.

On Feb. 27, 2015, Appellee was charged by criminal information with the misdemeanor offense of theft, which occurred on or about February 17, 2015. (C.R. 06). The underlying facts of that theft are contained only in the affidavit supporting Appellee's arrest warrant. (C.R. 07). Essentially, while a patient at a clinic, Appellee stole a cell phone belonging to another patient. *Id.* On March 03, 2016, a petit jury found Appellee guilty of the offense. (C.R. 46).

On March 04, 2016, the trial court sentenced Appellee to 180 days in the county jail, but suspended that sentence for a period of one year and placed Appellee under community supervision. (C.R. 48). One year later, on March 22, 2017, after the natural expiration of the community supervision, the trial court discharged Appellee. (C.R. 53). Appellee did not appeal the conviction, sentence or discharge.

Over two-and-a-half years later, Appellee moved for the trial court to grant judicial clemency pursuant to art. 42A.701(f).<sup>1</sup> (C.R. 55-57). On Nov. 19, 2019, the trial court granted Appellee's motion, set aside the jury's verdict, released Appellee from

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<sup>1</sup> In addition to a lack of subsequent convictions, Appellee claimed that she had been a successful business owner for 12 years and had a 17-year-old daughter, with whom Appellee was actively involved. (C.R. 56-57). Both were presumably true at the time that Appellee committed the theft in 2015.

any further penalties and disabilities related to the conviction, and dismissed the charging instrument. (C.R. 67). The trial court ordered the dismissal of the case and information. (C.R. 69-70). On Dec. 03, 2019, the State gave notice of intent to appeal.<sup>2</sup> (C.R. 73-74).

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<sup>2</sup> This court has jurisdiction over the appeal pursuant to art. 44.01. TEX. CODE CRIM. P. Art. 44.01(a). Specifically, the trial court's order dismissed the information. *See, Id.* at (a)(1); *State v. Shelton*, 396 S.W.3d 614, 614 n.01 (Tex. App.—Amarillo 2012, pet. ref'd).

### **SUMMARY OF THE ARGUMENT**

The trial court acted without jurisdiction to enter the order as Appellee had been discharged from community supervision for over two-and-a-half years. Any plenary power the trial court may have had to enter the order had long expired, and the order purporting to grant clemency was and is void. Further, the trial court lacked plenary power because Appellee's conviction was not eligible for judicial clemency.



## **CLAIM OF ERROR**

The State presents a single claim of error for this court to consider: that the trial court's order purporting to grant judicial clemency is void because the trial court acted outside of its jurisdiction. Specifically, the trial court's jurisdiction over the case ended in 2017 after the trial court originally discharged Appellee. By 2019, the trial court's jurisdiction had long been expired, and the trial court could not grant itself jurisdiction.

### **A. Applicable law and standard of review**

Jurisdiction is a court's ability to hear and make legally binding decisions on the parties involved. *State v. Dunbar*, 297 S.W.3d 777 (Tex. Crim. App. 2009). Jurisdiction is "an absolute systemic requirement." *Id.* Defects in jurisdiction may be raised for the first time on direct review. *Stine v. State*, 908 S.W.2d 429, 431 (Tex. Crim. App. 1995). As relevant here, a court's jurisdiction entails subject matter jurisdiction, which is conveyed by statute or constitutional provision, coupled with personal jurisdiction over the accused. *Id.* A lack of jurisdiction deprives a court of any authority to render a judgment; any judgment rendered by a court without jurisdiction is void. *Ex parte Moss*, 447 S.W.3d 786, 788 (Tex. Crim. App. 2014).

A trial court acquires personal jurisdiction over an accused by the filing of a criminal instrument – in this case, a criminal information. *See, Dunbar*, 297 S.W.3d at 780. "If no community supervision is imposed, no motion for new trial or in arrest of judgment is filed, and no appeal is taken, then the trial court's personal jurisdiction over the accused terminates thirty days after sentencing." *Id.*; *see also, In re State ex rel. Sistrunk*,

142 S.W.3d 497, 503 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (“Generally, a trial court has plenary jurisdiction over a case for the first thirty days after sentencing...”). Beyond that thirty days, “a source of jurisdiction must be found to authorize the trial court’s orders.” *Dunbar*, 297 S.W.3d at 780; (citing *State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002)); *c.f.*, *Drew v. State*, 743 S.W.2d 207, 223 (Tex. Crim. App. 1987) (reciting that the right to a motion for new trial is purely statutory, and not present in the common law).

In the case of a community supervision, a trial court may retain plenary power over the controversy up to thirty days after discharge or termination. *See, State v. Fielder*, 376 S.W.3d 784, 786 (Tex. App.—Waco 2011, no pet.) (trial court may have retained plenary power jurisdiction over controversy up to thirty days beyond discharge); *accord*, *Shelton*, 396 S.W.3d 614 (same); *State v. Perez*, 494 S.W.3d 901, 904-05 (Tex. App.—Corpus Christi-Edinburg 2016, no pet.) (same); *Buie v. State*, No. 06-13-00024-CR, 2013 WL 5310532, at \*02 (Tex. App.—Texarkana Sept. 20, 2013, no pet.) (mem. op., not designated for publication) (same); *Poornan v. State*, No. 05-18-00354-CR, 2018 WL 6566688, at \*02 (Tex. App.—Dallas, Dec. 13, 2018, no pet.) (mem. op., not designated for publication); *Moore v. State*, No. 09-06-00532-CR, 2008 WL 1904247, at \*02 (Tex. App.—Beaumont April 30, 2008, no pet.) (mem. op., not designated for publication) (trial court was without jurisdiction to act when it entered order two years after probation discharge); *Ex parte Lewis*, 934 S.W.2d 801, 803 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (“Once the probation period has expired, the trial court lacks

jurisdiction to alter or modify a defendant's probation"); *but see*, TEX. CODE CRIM. P. arts. 42A.201 & 42A.202 (explicitly extending trial court's post-judgment jurisdiction for what is common called "shock probation").

Art. 42A.701 governs early and satisfactory terminations from community supervision. TEX. CODE CRIM. P. Art. 42A.701. Under subsection (f):

If the judge discharges the defendant under this article, the judge may set aside the verdict or permit the defendant to withdraw the defendant's plea. A judge acting under this subsection shall dismiss the accusation, complaint, information, or indictment against the defendant. A defendant who receives a discharge and dismissal under this subsection is released from all penalties and disabilities resulting from the offense of which the defendant has been convicted or to which the defendant has pleaded guilt...

*Id.* at (f). This form of discharge is commonly referred to as "judicial clemency." *Cuellar v. State*, 70 S.W.3d 815, 818-19 (Tex. Crim. App. 2002).

Courts may not create jurisdiction where none exists. *See, Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996)(noting that the Texas Constitution and the Legislature create and vest jurisdiction, while court-established rules, such as the Rules of Appellate Procedure, do not).

**B. The trial court erred when it created for itself unlimited jurisdiction to grant judicial clemency, and granted judicial clemency to Appellee well after its actual jurisdiction or plenary power expired**

In this case, the trial court created its own jurisdiction where none existed. The trial court originally discharged Appellee on March 22, 2017. (C.R. 53). The trial court did not discharge Appellee early or satisfactorily; the trial court discharged Appellee's

probation due to the natural expiration of the supervision period. *Id.* Assuming that the trial court retained any plenary power to grant judicial clemency, that power expired on April 21, 2017 – a period thirty days after the discharge order. *See, Fielder*, 376 S.W.3d at 786; *Shelton*, 396 S.W.3d 614; *Perez*, 494 S.W.3d 904-905. The trial court’s jurisdiction had long-expired by the time it had issued its order in November 2019 – a period almost two years and eight months after the discharge order.

The trial court did not outline any sort of limitations on this jurisdiction. In both its oral findings and written conclusions of law the trial court invoked policy considerations to vest unlimited and indefinite jurisdiction in itself. *See*, (R.R. III 04-06); (C.R. 67). The trial court also noted that no explicit time limit was given in the code. (R.R. III 06). None of these considerations, however, are sufficient to grant the court jurisdiction.

Every court that has reviewed this issue has reached the same result: A trial court’s jurisdiction to enter this sort of order is limited by its plenary power.<sup>3</sup> *See, e.g., Fielder*, 376 S.W.3d at 786; *Shelton*, 396 S.W.3d at 618-19; *Perez*, 494 S.W.3d at 904-05; *Bnie*, 2013 WL 5310532, at \*02. Each court has followed the same fundamental line of

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<sup>3</sup> This court has not squarely addressed this issue – or the issue of when a trial court’s plenary power expires after the discharge of a community supervision. However, this court has addressed a similar issue of whether a criminal defendant may appeal a trial court’s denial of judicial clemency. *See, Raley v. State*, 441 S.W.3d 647 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d). In *Raley*, this court determined that a criminal defendant may not appeal a denial of judicial clemency. *Id.* at 651. This court cited favorably to *Shelton* for this issue.

reasoning: the trial court's plenary power to alter the order discharging the defendant and dismissing the cause terminated thirty days after the discharge order. *Id.*

The Court of Criminal Appeals has not explicitly held that judicial clemency is limited by its plenary power. It has, however, cited favorably to *Shelton* for this point. *See, State v. Guerrero*, 400 S.W.3d 576, 584 n.28 (Tex. Crim. App. 2013)(citing to *Shelton* to show a limitation on jurisdiction, and stating that “[t]he trial judge would have been justified in dismissing [motion to vacate filed nearly a decade after judgment was entered] as an ‘untimely motion in arrest of judgment for lack of jurisdiction’”).

Nothing in art. 42A.701(f) purports to extend the jurisdiction of a trial court. The Legislature knows how to extend a trial court's jurisdiction beyond final judgment. If it wanted to, it could. The statutes governing “shock probation,” for example, explicitly grant a trial court 180 days of jurisdiction beyond final judgment. TEX. CODE CRIM. P. Art. 42A.201-202. Even that extension of jurisdiction is limited. *See, e.g.*, TEX. CODE CRIM. P. Art. 42A.203 (reserving “shock probation” decision to original judge who ordered sentence). Similarly, after a defendant has been found not guilty by reason of insanity, the Legislature has explicitly extended jurisdiction beyond judgment in certain situations. TEX. CODE CRIM. P. Art. 46C.158. It would be remarkable for the Legislature to silently extend a trial court's jurisdiction to an indefinite period of time.

However, the trial court took the Legislature's silence to mean just that. The trial court found the lack of a time limitation in art. 42A.701(f) indicated that there was no limitation on the court's jurisdiction. (C.R. 67). This runs contrary to established law

and precedent that a trial court's jurisdiction terminates thirty days after judgment. *See, Dunbar*, 297 S.W.3d at 780; *Sistrunk*, 142 S.W.3d at 503. Extensions of jurisdiction are notable because they are the exception, not the rule.

The trial court also found two policy reasons for creating its own jurisdiction: 1) that limiting judicial clemency to the time of discharge limits a judge's consideration of whether sufficient rehabilitation has occurred, and, 2) defendants do not have representation during the time of discharge and therefore cannot demonstrate their rehabilitation. (C.R. 67). Assuming these have merit, these are policy decisions that are exclusively in the hands of the Legislature, not a trial court.<sup>4</sup> *See, Olivo*, 918 S.W.2d at 523 (courts may not create jurisdiction where none exists).

However, there are counterpoints to those considerations. There is merit to requiring a trial court to make the decision for judicial clemency at the time of discharge. At the time of discharge, a trial court has been supervising a criminal defendant for an extended period of time. At the time of discharge the trial court has seen how compliant a criminal defendant has been with the terms and conditions of a supervision. At the time of discharge, a trial court has seen the relevant progress, stagnation or regression

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<sup>4</sup> The trial court also cited to "a new update" to this provision of the code. (C.R. 06). That update consisted of the Legislature mandating the standardization of a form for discharge. TEX. CODE CRIM. P. Art. 42A.701(f-1)-(f-2). Appellee argued, and the trial court agreed, that the mandate for a specific form indicated a legislative intent for more judicial clemency. (R.R. II 07-08; III 06). The desire for a standardized form does not indicate any legislative desire other than standardization, and certainly does not act as a silent granting of jurisdiction. It certainly cannot be the case that the Legislature were secretly hoping that a trial court somewhere in Texas would divine the tea leaves of their intent and extend to itself jurisdiction.

of a defendant in criminal thinking. The time of discharge is the point at which a trial court has the greatest knowledge about a defendant's rehabilitation and can make a more informed judgment.

Of course, this court need not, and should not, weigh-in on the relative merits of these considerations. Neither the trial court's policy considerations nor the above counterpoint are relevant to jurisdiction. "Policy," and its infinite mutability, cannot create jurisdiction where none existed before. This court should declare the trial court's art. 42A.701(f) order to be void, reverse the trial court, and order the trial court to reinstate Appellee's conviction.

**C. The trial court's order was void because Appellee's discharge was not eligible for judicial clemency**

Assuming that art. 42A.701(f) silently grants unlimited jurisdiction to a court, the trial court's order is still void. Appellee's conviction was not subject to judicial clemency under art. 42A.701(f). Appellee's original discharge was due to the natural expiration of her community supervision, and was neither early terminated nor satisfactorily terminated under art. 42A.701.

Art. 42A.701(f), allows for a court to grant judicial clemency only "[i]f the judge discharges the defendant under this article." TEX. CODE CRIM. P. Art. 42A.701(f). There are two types of discharges under art. 42A.701: early termination discharges under subsection (a), and satisfactory discharges under subsection (e). Art. 42A.701 does not govern discharges due to the natural expiration of supervision. When a

defendant's community supervision naturally expires, a discharge is due to the natural expiration of its terms, not art. 42A.701.<sup>5</sup>

Here, Appellee was originally discharged because “[t]he period having expired, defendant is **discharged** by operation of law.” (C.R. 53)(emphasis in original). There were options for the trial court to find that Appellee should be either early terminated from supervision or satisfactorily terminated from supervision. *Id.* The trial court did neither.

Assuming that the trial court was correct in interpreting 42A.701 to silently grant unlimited and unfettered plenary power and jurisdiction, the trial court acted outside of that jurisdiction in granting clemency because Appellee was not discharged “under [42A.701].” TEX. CODE CRIM. P. Art. 42A.701(f). The trial court acted outside of its legal authority and jurisdiction, and this court should reverse its order.

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<sup>5</sup> Art. 42A.701 does not, for example, govern discharge for intoxication offenses or sex offender offenses, which are discharged due to the natural expiration of their terms. TEX. CODE CRIM. P. Art. 42A.701(g); *see also, Mahaffey v. State*, 937 S.W.2d 51, 54 (Tex. App.—Houston [1st Dist.] 1996, no pet.)(excepted intoxication offense is not eligible for consideration under predecessor statute to art. 42A.701).



## **CONCLUSION**

The trial court acted without authority when it created for itself unlimited jurisdiction and granted Appellee clemency. Appellee's case had been resolved by judgment and discharge over two-and-a-half years prior, and any power the trial court had to act was long expired. The trial court's order purporting to grant judicial clemency was void *ab initio* and the order setting aside the verdict, dismissing the case and dismissing the information was without effect.

**PRAYER FOR RELIEF**

It is respectfully submitted that the trial court erred. It is respectfully requested that this court reverse the trial court, order the trial court to reinstate Appellee's conviction, and order any other consistent relief this court deems appropriate.

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

The undersigned certifies that, according to Microsoft Word, the portions of the brief for which TEX. R. APP. P. 9.4(i)(1) requires a word count contains 3,038 word.

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